

ing to the Lord Ordinary's judgment upon that third question also.

We are told that there is a question as to the liability of the trustees for settlement estate duty, but the reclaimers concede that the question is ruled by the decision in the case of *Stewart's Trustees* (1 F. 416), which they also concede is binding on this Court. We have heard no argument upon that matter and express no opinion upon it, but upon the questions which have been argued I agree with the Lord Ordinary, and am for adhering to his judgment.

LORD M'LAREN—I agree with the opinion of the Lord Ordinary, and concur in the opinion of Lord Kinnear.

LORD ADAM—I concur.

The Court adhered.

Counsel for the Pursuer and Respondent—Solicitor-General (Dundas, K.C.)—A. J. Young. Agent—Philip J. Hamilton Grieron, Solicitor of Inland Revenue.

Counsel for the Defenders and Reclaimers—Lorimer, K.C.—Grainger Stewart. Agents—A. & A. Campbell, W.S.

Wednesday, January 11.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

SUTHERLAND v. THE PROVOST AND MAGISTRATES OF WICK.

Burgh—Town-Clerk—Salary—Extension of Burgh—Increase of Town-Clerk's Duties—Claim for Increase of Salary—Application to Fix Reasonable Salary—Magistrates' Discretion in Fixing Salary.

A royal burgh was by Act of Parliament extended by the inclusion within it of a neighbouring burgh. The town-clerk of the royal burgh became under the Act the town-clerk of the extended burgh, no provision being made as to his remuneration. The magistrates, after the amalgamation, fixed his salary at an amount which somewhat exceeded the salary he had formerly received, but which he contended was really less in view of the increase of his duties and outlays. In an action brought by him against the provost, magistrates, and councillors of the burgh for declarator that they were bound to pay to him as town-clerk a reasonable and suitable salary fixed by the Court, he averred, *inter alia*, that the resolution of the defenders fixing his present salary was not a *bona fide* exercise of their powers.

Held that the amount of the remuneration of the town-clerk was a matter in the discretion of the magistrates, in which the Court could not interfere in the absence of relevant and sufficient averments that the magistrates had acted dishonestly and corruptly or with a malignant desire to injure, and defenders *assoluzied*.

This was an action at the instance of Hector Sutherland, solicitor, Wick, against the Provost, Magistrates, and Councillors of the burgh of Wick, concluding for declarator that the defenders were bound (1) "to provide for and pay to the pursuer, as town-clerk of the burgh of Wick, a reasonable and suitable remuneration for his services as town-clerk foresaid"; and (2) "to make payment to the pursuer, as town-clerk foresaid, of the sum of £280 sterling per annum, or such other sum as our said Lords may find to be reasonable and suitable remuneration to the pursuer as town-clerk foresaid as from 18th November 1902."

The following narrative of facts is taken from the opinion of the Lord Ordinary (KINCAIRNEY):—"This action has arisen out of the recent amalgamation of the adjacent burghs of Wick and Pulteneytown, and relates to the salary of the town-clerk of the burgh as extended by the Act by which the amalgamation was effected. That Act confirmed a Provisional Order, and was passed on 18th November 1902. It is entitled the Wick Burgh Extension Order Confirmation Act 1902. It takes the form of an extension of the burgh of Wick rather than of an amalgamation of Wick and Pulteneytown, and its effect seems to be to extinguish the burgh of Pulteneytown and to enlarge the burgh of Wick so as to include within its boundaries the old burgh and royalty of Wick, the burgh of Pulteneytown, the harbour of Pulteneytown, and other adjacent lands.

"By section 3 of the Act (the interpretation clause) it is provided that the 'existing burgh of Wick' means the burgh of Wick including the royalty as existing immediately previous to the commencement of the Order; that the 'burgh' and 'royal burgh' mean the existing burgh of Wick as extended by the Order; and that 'town-clerk' means the town-clerk of the 'existing burgh of Wick and of the burgh.'

"The pursuer of this action is the town-clerk of the extended burgh. He does not take that title in the instance, but he sues in that capacity, and can have no possible case unless he is so. He is not an applicant for the office, nor a person to whom the office has been offered, or who claims to be entitled to be appointed; he is, or at least must claim to be, the actual holder of that office.

"His position is as follows:—He has been town-clerk of the burgh of Wick since 1886. It is not very distinctly set forth what his salary or emoluments were then. In 1897 the Magistrates instituted an inquiry in regard to the salaries of the various servants and officials of the burgh, the result of which, as regards the town-clerkship, was that the town-clerk's salary was fixed at £100, besides business chambers rent free. To what extent he was allowed legal charges for work done for the burgh is not stated quite distinctly. The salary was fixed after inquiry as to the salaries of the town-clerks of various Scotch burghs. An allocation was made of the £100 among the various offices or duties which were covered under the general term

of town-clerk. I suppose that this allocation was thought to be necessary for the accurate statement of the burgh accounts. It appears that the town-clerk was far from satisfied either with the amount of the salary fixed or with the allocation of it, and he laid before the Magistrates a long memorandum on the subject, but he undertook the office and entered on its duties.

“When the Act extending the burgh was passed on 18th November 1902 the pursuer became town-clerk of the extended burgh without any express appointment to that effect, and I apprehend that he was so necessarily unless he resigned all connection with the town-clerkship of Wick. He could not possibly have claimed to be town-clerk of the old burgh of Wick (which had ceased to exist), and refused to undertake the duties of town-clerk of the extended burgh. In truth he merely continued in the office of town-clerk of the burgh which he held by permanent tenure.

“It does not appear that when the Act was being carried through he took any steps to secure any provision for his salary. He allowed the Act to pass fixing on him the position of town-clerk of the enlarged burgh with all its duties, trusting, I suppose, to the liberality of the Magistrates.

“When the Act came into operation the Magistrates took into consideration the salaries of the various officials, including the salary of the town-clerk. They seem to have considered the subject carefully, and so far as the minutes show impartially and fairly. I find nothing in the minutes to indicate the reverse, and they fixed the salary of the town-clerk at £120. I observe that there was a division in the Council on this point, a minority being for £140.

“The pursuer, who had thought the salary of £100 fixed in 1897 inadequate, was greatly dissatisfied with the addition to it, which he thought quite insufficient, seeing, as he says, that the population and valuation of the extended burgh were more than double those of the old burgh; and he has brought this action, which contains two conclusions of declarator, the former a general conclusion that the defenders are bound to pay the pursuer as town-clerk ‘a reasonable and suitable remuneration’ for his services; the other that they were bound to pay him £280 per annum, ‘or such other sum as our said Lords may find to be reasonable and suitable remuneration.’ The pursuer’s whole case seems embodied in his second conclusion, and the first appears to be superfluous.”

The pursuer made the following averments as to the resolution of the Town Council by which his salary was fixed at £120 — “(Cond. 7) . . . It is believed and averred that the resolution of the Town Council to fix the pursuer’s salary at the figure above mentioned was not a *bona fide* exercise of the powers entrusted to them, and was not arrived at on a fair consideration of the circumstances, but it was engineered for purposes, and arrived at on considerations quite foreign to a fair exercise of the defenders’ discretion. The said resolution was brought about through the exertions of three members of the Town

Council, viz. . . . who had conceived feelings of ill-will and animosity against the pursuer in connection with matters quite foreign to the pursuer’s duties as town-clerk. The said members avowedly entered the Town Council for the purpose of paying off their private grudge against the pursuer. From the time they were elected they set about doing so, and they did not rest until they accomplished their aim. They unduly influenced the other members, and under the guise of public duty they attacked the pursuer, and persuaded their fellow-members to fix the pursuer’s salary at the figure above stated. The said resolution was the result of a preconceived scheme to make a personal attack upon the pursuer with the object of gratifying the vindictive feelings of the said members. . . . It was not arrived at in the impartial or *bona fide* discharge of the defenders’ duties, but amounts to an attempt to deprive the pursuer of his office by imposing impossible conditions upon the performance of his duties.” . . .

The pursuers pleaded—“(1) The defenders being bound to provide for the pursuer as town-clerk foresaid reasonable and suitable remuneration, the pursuer is entitled to decree in terms of the first conclusion of the summons. (2) The defenders having failed to fix a reasonable and suitable remuneration for the pursuer as town-clerk foresaid, the pursuer is entitled to have the same fixed by the Court, and to decree in terms of the second conclusion of the summons, with expenses. (3) The resolution of the defenders fixing the pursuer’s salary not being a *bona fide* exercise of the defenders’ powers, the pursuer is entitled to decree.”

The defenders pleaded, *inter alia*—“(3) The pursuer’s salary as town-clerk of Wick having been fixed by the defenders after full consideration of the whole facts and circumstances, and in the deliberate exercise of their discretionary right and duty, the defenders should be assolvizd from the conclusions of the summons. (4) The salary fixed by the defenders being reasonable and suitable remuneration for the duties devolving upon pursuer, the defenders are entitled to absolvitor.”

The Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—“Finds (1) that the pursuer was town-clerk of the burgh of Wick before the enlargement of its boundaries by the inclusion of the burgh of Pulteneytown by Act dated 18th November 1902: (2) That he is town-clerk of the burgh as extended by that Act: (3) That the pursuer’s salary as town-clerk of the burgh as enlarged was fixed at £120 by resolution of the Magistrates dated 3rd August 1903: (4) That there is no relevant averment that in coming to that resolution the defenders acted corruptly and not in the due exercise of their powers under the Act 63 and 64 Vict. c. 49, sec. 78: (5) That no relevant ground is stated for refusing effect to that resolution: Therefore assolvizies the defenders from the conclusions of the summons, and decerns.”

Opinion.— . . . “This is not an action for remuneration for services rendered founded either on contract or on the prin-

ciple of *quantum meruit*, although it is true that the conclusions go back to the date of the Act. It is an action asking the Court to fix the pursuer's salary, to order payment of that amount for the years bygone, and also, and chiefly, to determine his right to it in future. If the pursuer were on the footing of an ordinary servant or clerk, or other official, it is quite obvious that he could have no action. He could only claim a salary on contract, and, if he did not choose to accept the salary offered, his action would necessarily fail, unless he claimed a *quantum meruit* for the years bygone, which is not the nature of this action at all. I suppose that none of the other servants hired and paid by the Magistrates could raise such an action. If dissatisfied with their wage they could do nothing but decline the appointment.

"But the question raised in this case depends on the circumstance that the pursuer is not in the position of an ordinary servant, subject to dismissal at the defenders' pleasure. He contends, and I think rightly, that his office of town-clerk is a *munus publicum*, and that he is not answerable to the Magistrates as a servant is to his master or a clerk to his employer. He maintains that he is a State official, and that he holds his office by a permanent tenure, and is not liable to dismissal by the Magistrates.

"This is an important question, but I cannot but think it not open to doubt. The relation between town-clerks and magistrates is regulated in the first place by section 78 of the Town Councils Act 1900 (63 and 64 Vict. c. 49), which provides 'that the council shall from time to time appoint a fit person to be town-clerk of the burgh,' and that in the case of royal burghs 'the tenure of office' (when not regulated by local Act) 'shall be the same as the tenure of the office of town-clerk in such burghs respectively according to existing law.'

"This is a reference to common law, and the pursuer contends that at common law the tenure of the office of town-clerks is permanent, and that he holds it *ad vitam aut culpam*, and is not subject to dismissal by the Magistrates. On this point the pursuer cited *Simpson v. Tod*, June 1824, 3 S. 150; *Farish v. Magistrates of Annan*, 1836, 15 S. 107, *aff.* July 1837, 2 S. & M.L. 930; *Magistrates of Rothesay v. Carse*, January 31, 1903, 5 F. 383; *Board of Supervision v. Parochial Board of Old Monkland*, January 17, 1880, 7 R. 469, *per* Lord President and Lord Deas, 473.

"I need not refer to these authorities at length, because I do not think the point open to doubt. I think it was not disputed, and I think it clear, that the pursuer holds his present office *ad vitam aut culpam*. He may resign, no doubt, if he chooses, and so bring his office to an end, but he cannot be dismissed.

"The position of the pursuer is, no doubt, somewhat peculiar. Just before the Act passed he held the office of town-clerk of the old burgh of Wick. It might be argued that when the Act was passed that office came to an end by the act of the Legislature,

but I am of opinion that that was not so, and that the pursuer's office never came to an end, but that the burgh of Wick was enlarged, and the duties of the town-clerk were continued and extended over the new boundaries.

"The pursuer contends that the principle that a town-clerk cannot be dismissed by the Magistrates involves the principle that his salary cannot be reduced. He cited, among other cases, the *Magistrates of Dundee v. Kerr*, 1833, 12 S. 173, and *Downie v. Magistrates of Annan*, January 7, 1871, 6 R. 457, which seem to afford some support to that contention. The latter case is difficult to follow, as the judgment seems to decide a point which was not in the case. I do not find it necessary to decide that point, because here there was no reduction of the pursuer's salary but an addition to it, said, no doubt, to be inadequate. But the pursuer further contends that the permanence of his tenure of office involves the further consequence that the conditions of it cannot be altered to his disadvantage. He argues that to increase the duties is just an indirect way of reducing the salary. I am not prepared to assent to that argument, for which I think no authority was adduced. I cannot see that the duties of the office of a town-clerk could be accurately and finally defined when he was appointed. The salary might be, but not the duties. The duties of the office of town-clerk are essentially liable to change from various causes—by extension of the boundaries of the burgh, and by the imposition of various duties connected with the municipal and local government—as is well illustrated by the various heads and divisions in which the salary of the town-clerk in this case was subdivided. I think it was never heard of that on every alteration of the boundaries of a burgh the salary of the town-clerk would necessarily be altered. No authority to that effect was produced, and if in this case the pursuer's salary had not been increased at all I do not perceive any legal ground on which an increase of the salary could have been enforced. I agree that a town-clerk is a public officer and that he holds an independent position. But I think that so long as he holds that public office he must fulfil all the duties with which the Legislature thinks fit to burden it, and if, as in this case, the duties of a town-clerk are increased by Act of Parliament which does not provide for an increase of his salary, I do not see that the Magistrates of a burgh can be compelled to increase it.

"In this case, however, they have increased his salary, and the pursuer argues that the increase ought to have been greater. Perhaps it should—I do not know. They, I take it, must be the judges. I think that is a matter which the law has entrusted to the discretion of the local authorities, and so long as they exercise that discretion honestly I think the Court has no duty to interfere. If they should be held entitled and bound to interfere in this case they might be called on to adjust the salaries of all public servants in the country. But that is a duty which the law has entrusted

to the local authorities or has left to be adjusted by mutual contract.

“Therefore, upon the general law of the case, I am of opinion that the Court has no power, or at least no duty, to interfere in this case.

“But the pursuer raises a point of a totally different kind, for he pleads that, assuming the Magistrates have power to fix his salary, they have not exercised their power honestly. Now, if there be a relevant averment of corruption by magistrates in the exercise of their duties, I am not prepared to say that that might not be made the subject of inquiry. But if that were so one would have expected conclusions of reduction. But I am of opinion that the averments of the pursuer are wholly irrelevant. What is averred is that three of the members of the Council entertained feelings of animosity towards the pursuer, and avowedly entered the Town Council for the purpose of paying off their private grudge against the pursuer. What the reasons of their supposed animosity and grudge were is not explained. I think that averment is irrelevant on account of its vagueness and want of meaning. Then it is said that these three individuals persuaded their fellow-members to fix the pursuer's salary at the low rate agreed to, but it is not said what the nature of the persuasion was, and in particular it is not averred that they bribed or endeavoured to bribe their brother councillors, or that anything which they told them was untrue or was defamatory of the pursuer. If all that is meant was that the other councillors yielded to the bad arguments of the three who are complained of, it would be absurd to contend that on that account the resolution of the Magistrates should not receive effect.

“It is not pretended that the resolution of the Magistrates could be reduced on the ground that three of them were hostile to the pursuer, or on the ground that all of them were so, and accordingly there are no conclusions of reduction. But if a resolution of a public body like the magistrates of a burgh cannot be reduced, it must surely follow that it must receive effect.

“I am not disposed to doubt that the work thrown on the pursuer will be much increased. How much I do not know, and I would not have been surprised had the Magistrates been more liberal in adding to his salary, but my opinion is that they are the proper judges, and that their decision must receive effect if it was fairly and honestly arrived at, which of course it must be presumed to have been.

“For these reasons I am of opinion that there is no relevant averment of corruption or failure of duty by the Magistrates in performing the duty of fixing the town-clerk's salary; that no relevant grounds are stated for refusing effect to their decision; and that they must be assoilzied.”

The pursuer reclaimed, and argued—His appointment being *ad vitam aut culpam*, the Magistrates had no power to dismiss him except for fault—Town Councils (Scotland) Act 1900, sec. 78—*Simpson v. Tod*,

June 17, 1824, 3 S. 150; *Farish v. Magistrates of Annan*, November 22, 1836, 15 S. 107, *aff.* 2 S. & M.L. 930; *Magistrates of Rothesay v. Carse*, January 31, 1903, 5 F. 383, 39 S.L.R. 450; *Board of Supervision v. Parochial Board of Old Monkland*, January 1880, 7 R. 469, 17 S.L.R. 297. But to load a public official with extra duties without corresponding remuneration was practically dismissing him, as he would be compelled to resign. Further, the Magistrates were not entitled to reduce his salary, but looking to the increase of his duties and outlays they had really done so—*Downie v. Magistrates of Annan*, January 7, 1876, 6 R. 457, at p. 460; *Abercromby v. Goldsmiths of Edinburgh*, November 19, 1802, M. 13,154; *Cunningham v. General Convention of Royal Burghs*, June 22, 1839, 1 D. 1077, 1 B. App. 628; *Magistrates of Dundee v. Kerr*, 1833, 12 S. 173. This differed from the ordinary case of the gradual growth of a burgh which might reasonably be within the contemplation of parties when the amount of salary was arranged. It was an extraordinary extension brought about by the Magistrates who promoted the Bill, and who were practically trying to get the work of two town-clerks done by one. Section 15 of the Public Health (Scotland) Act 1897 indicated that the policy of the Legislature was to give reasonable remuneration to public officials. He was at any rate entitled to an inquiry into the *bona fides* of the Magistrates.

Argued for the respondents—The question of the adequacy of the town-clerk's salary was entirely within the discretion of the Magistrates. The Magistrates had honestly exercised their discretion in fixing the pursuer's salary, and the averments of the pursuer to the contrary were irrelevant and wholly wanting in specification. The pursuer's salary was a matter of contract, and not one for the Court—*Forbes v. Magistrates of Banff*, February 23, 1856, 18 D. 645, at 650. An increase of his duties did not *per se* give a town-clerk a right to an increase of salary—*Maxton v. Magistrates of Dunoon*, December 16, 1904, 42 S.L.R. 234. As a matter of fact, however, his salary had been increased and was adequate. If dissatisfied his remedy was to resign.

LORD JUSTICE-CLERK—The pursuer was town-clerk of Wick, and as such is now town-clerk of the extended burgh of Wick, which includes Pulteneytown. This action takes the form of a declarator that the defenders, the Magistrates and Town Council of the burgh of Wick, (1) are bound and obliged to provide for and to pay to the pursuer as town-clerk of the burgh of Wick a reasonable and suitable remuneration for his services as town-clerk foresaid; and (2) that the defenders are bound and obliged to make payment to the pursuer as town-clerk foresaid the sum of £280 sterling per annum, or such other sum as the Court may find to be reasonable and suitable remuneration. Now, Mr Salvesen in the course of his address made it plain that he did not press the proposition upon the declarator at all, but that he based his

case upon the petitory conclusion that the Magistrates and Council of Wick were bound to pay to the town-clerk such a salary as this Court shall think adequate. I know of no precedent whatever for such procedure. The Town Council when appointing a town-clerk offer him such a salary as they think adequate and sufficient for the duties, and if those who are candidates for the office do not think such salary sufficient they are under no obligation to accept the office at all. If at any time in the course of his fulfilment of the duties of the office he thinks the duties of that office have increased upon him to such an extent that his salary is inadequate, he may apply for an increase, and it is in the discretion of the Magistrates and Town Council to decide whether the duties which he is doing call for that increase or not. If they do not think so, the town-clerk has simply to consider whether he will remain at the salary as it is, or whether he will retire.

I do not consider that this question is affected at all by the fact, which is no doubt true, that the town-clerk is a public official and holds his office *ad vitam aut culpam*. That simply results in this, that whatever salary is fixed for him, either at first or from time to time by additions, cannot be cut down so long as he remains town-clerk without his consent. Therefore he has a fixed position and a right to receive that salary as long as the performance of these duties is to the satisfaction of the Magistrates and Town Council. But it is a totally different thing when he demands a rise of salary. There cannot be the slightest doubt that there are a great many duties which have been imposed upon public officials by Act of Parliament, which have added largely to the duties they have to do, and in some places the Act of Parliament has ordained that the putting of these additional duties upon him shall give him a right to a reasonable increase of salary. But then there are other Acts of Parliament which have not introduced that matter at all, and in regard to these it has been held by this Court that the town-clerk had no claim for an additional salary notwithstanding the increase of his duties. Now, in this particular case it is not the ordinary mere extension of a burgh by the taking in of certain outlying districts, or by the increase of the population and the work to be done within the existing district. The only peculiarity about it is this, that instead of absorbing what was before a mere outlying part of the country to which the burgh development had extended, it was in this case the actual absorption of a burgh itself. That is nothing new. Glasgow, I think if I remember right, some fifteen or sixteen years ago absorbed a number of parasitical burghs into the city, and I do not think it makes any practical difference whether the district absorbed has been a burgh before or simply an area with no burghal character at all. The question therefore comes to be, whether we can interfere with the Provost, Magistrates, and Town Council of Wick, in the

discretion which they have exercised, in saying that the salary of the town-clerk, which was formerly £100, shall only be increased by £20. We are told that that is not really the actual state of matters. Whereas formerly for his £100 he had to do the duties of law-agent as well without further remuneration—now he gets his salary of £120, and for the law business which he is asked to do he charges the ordinary fees. But whether that is so or not, the Provost, Magistrates, and Council were entitled to consider the matter, and dispose of it, as to whether the town-clerk should get an increase, and what increase they should give. I think the Lord Ordinary arrived at a right decision in holding that there is no relevant case stated here to entitle the pursuer to succeed.

I will only say this further, and it is a matter that should be dealt with, that I could quite well conceive a case where corruptly the municipality might do what they were not entitled to do in a matter of this kind. If it could be averred sufficiently that they acted, not in the exercise and discharge of their duty, but in the exercise of a malignant desire to injure, then possibly that would open a case which this Court would deal with, but we could only deal with it in the sense of setting aside something that had been done and calling upon the Town Council to do their duty. But it is very difficult to conceive that such a case could arise in which the Court could be called upon to interfere. I do not think the Court can be called upon to interfere and consider and fix what salary shall be paid by the Provost, Magistrates, and Town Council of Wick to their town-clerk. I therefore move your Lordships that we adhere to the Lord Ordinary's decision.

LORD YOUNG—I concur. I assent to all the observations which your Lordship has made.

LORD KYLLACHY—I also concur. Extreme cases could be figured, but these must be dealt with when they arise. I agree with the Lord Ordinary and your Lordships that the pursuer here has stated no case relevant and sufficient to justify the interference of the Court.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Salvesen, K.C.—D. Anderson. Agent—S. F. Sutherland, S.S.C.

Counsel for the Defenders and Respondent—Shaw, K.C.—M'Lennan. Agents—Melville & Lindesay, W.S.